

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION)) MDL NO. 1456) Civil Action No. 01-12257-PBS) Subcategory No. 03-10643
THIS DOCUMENT RELATES TO:)
<i>The City of New York, et al.</i>)
v.)
<i>Abbott Laboratories, Inc., et al.</i>)

**NOVEMBER 2009 STATUS REPORT ON BEHALF OF
THE CITY OF NEW YORK AND NEW YORK COUNTIES**

The undersigned counsel for the City of New York and New York Counties in the above-captioned action (hereinafter referred to as “plaintiffs”) hereby submit the attached Status Report for November 2009, in accordance with the Court’s June 17, 2004 Procedural Order.

Dated: November 2, 2009

Respectfully submitted,

**City of New York and New York Counties in
MDL 1456 except Nassau and Orange, by**

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**November 2009 Status Report on Behalf of the
City of New York and New York Counties**

FUL Summary Judgment Briefing

1. Supplemental Filings

On July 8, 2009, the Court heard oral arguments on the parties' respective motions for partial summary judgment on FUL issues. At the hearing, the Court requested a filing from the Department of Justice ("DOJ") to supplement the Brief of the United States on the Federal Upper Limit, filed June 28, 2007 [Docket No. 4413]. The DOJ fully intended to provide a supplemental brief in October 2009 but that filing has been delayed due to extensive litigation activity in the DOJ AWP matters and other pressing priorities within CMS. The DOJ has advised that it will file its supplemental brief on or before November 25, 2009. The DOJ reports that its amicus brief will provide additional detail concerning the operation of the Federal Upper Limits program, including a response to the PowerPoint slides of Dr. Sumanth Addanki provided to the Court by defendants' counsel on July 20, 2009.

2. Defendants' Motion to Exclude Plaintiffs' Expert Testimony

On July 23, 2009, the Court granted Defendants' Motion for Leave to File Reply Memorandum in Support of Joint Motion to Exclude the Proffered Expert Report and Testimony of Harris Devor, C.P.A. [Docket No. 6253, Sub-docket No. 137]. Defendants filed their reply that day [Docket No. 6281; Sub-docket No. 150]. Oral argument has yet to be scheduled.

GSK Motion for Partial Summary Judgment

On July 2, 2009, GSK filed its sur-reply in support of its Motion for Partial Summary Judgment. [Docket No. 6250; Sub-docket No. 135]. The parties have requested a date for additional oral argument on this motion. No date has yet been set.

Discovery

1. Motion to Compel Discovery from Defendant Merck

On September 4, 2009, plaintiffs filed their Motion to Compel Discovery from Defendant Merck for all at-issue drugs with annual AMP/AWP spreads over 30 percent. *See* Docket No. 6487; Sub-docket No. 158.

On October 5, 2009, Merck filed its opposition to plaintiffs' motion to compel. *See* Docket No. 6572, Sub-docket No. 168.

On October 23, 2009, plaintiffs filed their Motion for Leave to File Reply Memorandum in Further Support of Plaintiffs' Motion to Compel Discovery from Defendant Merck & Co., Inc., and Exhibits to the Declaration of Joanne M. Cicala in Support Thereof Under Seal. *See* Docket No. 6609, Sub-docket No. 175. This motion remains *sub-judice*.

On October 23, 2009, plaintiffs filed their Reply Memorandum in Further Support of their Motion to Compel Discovery from Defendant Merck. *See* Docket No. 6607, Sub-docket No. 173. This motion remains *sub-judice*.

2. Schering's Motion for a Protective Order

Plaintiffs will file their motion to lift the Schering Protective Order and expert affidavit after the Court rules on GSK's Motion for Partial Summary Judgment [Docket No. 5706].

Proposed Schering/Ven-a-Care Settlement

On August 28, 2009, plaintiffs filed their Response and Objection to the Motion for Approval of Settlement Between California, Florida, and Relator Ven-A-Care of the Florida Keys on Behalf of Itself and the United States and Schering-Plough, Schering and Warrick (hereinafter referred to as "proposed Schering/Ven-A-Care settlement"). *See* Docket No. 6435.

On September 11, 2009, plaintiffs filed their sur-response and objection to the motion for approval of proposed Schering/Ven-A-Care settlement. *See* Docket No. 6502.

On October 30, 2009, the Court held a settlement conference regarding the motion for approval of the proposed Schering/Ven-A-Care settlement. *See* October 22, 2009 Electronic Notice of Rescheduled Hearing.

The Court scheduled a final settlement approval hearing regarding the motion for approval of the proposed Schering/Ven-A-Care settlement for December 4, 2009. *See* October 30, 2009 electronic clerk's notes for proceedings held before Judge Patti B. Saris.

CERTIFICATE OF SERVICE

I, Kathryn Allen, hereby certify that on the 2nd day of November, 2009, I caused a true and correct copy of the above November 2009 Status Report for the City of New York and New York Counties to be delivered to counsel of record for defendants by electronic service pursuant to Case Management Order No. 2 entered by the Honorable Patti B. Saris in MDL No. 1456.

Dated: November 2, 2009

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